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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAROL L. MEYER,

Petitioner,

VS.

JOHN LEHMAN, SECRETARY OF THE NAVY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the defendant's burden of production includes proof of business necessity.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on April 3, 1984, petition for rehearing thereof having been denied June 26, 1984.

OPINIONS BELOW

The Order Denying the Petition for Rehearing, the Memorandum Opinion of the Court of Appeals for the Ninth Circuit, and the Findings of Fact, Conclusions of Law, of the District Court for the Northern District of California, in this case, have not been reported. They are set forth in the Appendix, *infra*.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Ninth Circuit, herein sought to be reviewed, was entered on April 3, 1984. A timely Petition for Rehearing was denied by that court on June 26, 1984. On September 13, 1984, Justice Rehnquist extended the time in which this petition could be filed to October 24, 1984. Jurisdiction of this Court to grant the writ is conferred by 28 United States Code, Section 1254.

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, *as amended*, which provides in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a).

STATEMENT OF THE CASE

The petitioner is CAROL L. MEYER, a white female adult citizen of the United States, residing in San Mateo, California.

On September 14, 1982, petitioner filed the instant civil rights action pursuant to Title VII of the Civil Rights Act of 1964, *as amended*. The complaint alleged gender discrimination in employment with respect to defendant's promotion procedures.

On May 4-5, 1983, a non-jury trial was held before the Honorable William W. Schwarzer, United States District Judge, Northern District of California, and at the conclusion therein, verdict was announced in favor of respondent.

On May 9, 1983, judgment was entered in favor of respondent. (Appendix B.)

On May 23, 1983, petitioner moved to alter or amend the judgment or, in the alternative, for a new trial. The motion was denied on May 26, 1983.

On June 8, 1983, petitioner filed a timely notice of appeal from the judgment of the district court entered in favor of respondent and the order denying petitioner's motion for a new trial.

On April 3, 1984, the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment and denied petitioner's petition for rehearing on June 26, 1984. (Appendices C and D.)

Petitioner has been employed as a Community Planner, GS-12, by the Naval Facilities Engineering Command, Western Division, San Bruno, California for over eight (8) years, beginning in May 1976 as a Community Planner, GS-11.

On or about November 26, 1979, petitioner applied for the promotional vacancy of "Interdisciplinary, Supervisory, Community Planner, GS-13," announced under Promotional Opportunity Number (79) 20-38.

In March, 1980, a male, Robert Talley, was selected to fill the promotional vacancy.

The stated qualifications for the position were:

> The incumbent must be professionally trained and experienced in landscape architecture, urban planning, civil engineering, or architecture; and must possess a goo working knowledge of any and all of the (sic) disciplines in which he has not received professional training. In addition, a firm grounding in environmental sciences, real estate practices, intergovernmental coordination, and government administration is desirable. Familiarity with the Navy and its institutions, organization, terminology, and *modus operandi* is essential. Successful performance in the position requires analytical ability, imagination, and superior ability to communicate ideas through sketches, formal graphic methods, and the written and spoken word.

The qualifications for the position had two (2) major aspects: (1) the candidate must be "professionally trained and experienced in landscape architecture, urban planning, civil engineering, or architecture" and (2) an "additional" (sic) "desirable" "firm grounding in environmental science, real estate practices, intergovernmental coordination, and governmental administration."

At trial, ample evidence was introduced to demonstrate that petitioner's qualifications were objectively far superior to those of the male selectee.

First, petitioner's academic qualilfications were outstanding. Petitioner had an undergraduate degree in community planning from the University of California, Berkeley, a Master's Degree from Harvard University in Urban & Regional Planning, and had completed further graduate study

in the field at Stanford University. Petitioner also had training in the area of landscape architecture. In short, petitioner was clearly "professionally trained" in the promotional position's focal area.

Next, petitioner's work experience, indeed, her entire adult work-life since obtaining her undergraduate degree, had been in the area of urban planning and associated disciplines. Moreover, petitioner possessed the supervisory experience demanded by the position. This experience included the supervision of draftspersons, civil engineers, planners and architects.

The male selectee's academic and work background did not even come close to the depth and breadth of petitioner's vitae. For example, his academic qualifications amounted to a B.A. degree in Urban Studies from San Francisco State University.

With respect to the male selectee's professional training and adult work-life, his experience in the area of urban planning and associated disciplines was meager at best. He had held a series of jobs in various small financial institutions in which he was employed as a loan officer. The selectee's pre-Navy supervisory experience related to the supervision of clerical employees. With regard to his Navy supervisory experience, that promotional edge derived almost exclusively from his two details to the promotional position on a temporary basis.

The Ranking Panel convened to evaluate candidates for the promotional position was comprised of four (4) males; three (3) civilians and one (1) naval officer who served as chair of the panel. Six applicants including petitioner and the selectee were rated as "highly qualified" by the panel and their names were forwarded to the Advisory Selection Panel.

The Advisory Selection Panel was similarly composed of males, two (2) civilians and one (1) naval officer. The three members of the panel were Brian O'Connell, Head of the Planning Real Estate Department, Martin Pearson, Chief of the Planning Division and O'Connell's immediate subordinate, and James Mildes, Supervisor of the Master Planning Branch and Pearson's immediate subordinate.

At trial, each of the three members of the Advisory Selection panel testified as to their reasons for promoting the selectee, Robert Talley, over Ms. Meyer.

The District Court found that it was "not disputed by the (respondent) that the (petitioner) was qualified for the position. As a member of the protected class, she made out a prima facie case." (Appendix A at 1a.)

The District Court found that respondent came forward "with evidence of what it holds out to be non-discriminatory reasons" for petitioner's non-selection. This evidence was comprised of the testimony of the three (3) members of the all male selection panel. One of them, Captain O'Donnell testified that he selected a male because of (1) his demonstrated grasp of Navy planning; (2) the selectee's communication skills and the selectee's ability to supervise others; (3) the selectee's planning activities had exposed him to a broad range of issues; (4) his confidence in the selectee's ability to represent the Navy's interest; and he considered the selectee cool, forthright, energetic, and could write well. (Appendix A at 2a.)

Martin Pearson, in whose department the promotion vacancy existed, testified that he selected the male on the basis of his exemplary interview. (The selectee's interview was conducted via a long distance telephone call from either the Los Angeles or the San Diego International Airport. It was about ten (10) minutes in duration. The petitioner and

the other three (3) applicants were interviewed in person.) To Pearson's testimony, the District Court added that Peason had in mind the selectee's planning experience, his performance on the job, and his employment stability. As to Pearson's undeniable predisposition to select the man for the position, the District Court explained, "that standing alone does not seem to me to merit an inference of a discriminatory motive for that preference." (Appendix A at 3a.)

The third member of the Selection Advisory Panel, Mr. Mildes, the District Court found, selected the male for (1) his extensive experience in managing Master Planning Projects; (2) the selectee's ability to communicate with people in difficult situations; and (3) the selectee's background in Navy planning.

The District Court found that the petitioner had, "indeed, established her strong qualifications" which were relevant to the position. To avoid drawing the inference required (i.e., petitioner's qualifications were definitely job-related as measured by the position description), the District Court explained "the issue" is not whether (petitioner) might have been a good and perhaps even a better choice." Rather, "the question is whether the (petitioner) had shown by a preponderance of the evidence that the reasons given by the (respondent's) witnesses were not the true reasons and that sex discrimination was a factor in the selection of" the man. (Appendix A at 3a.)

Applying the clearly erroneous standard of review, the Court of Appeals held there was sufficient credible evidence for the District Court to find that the respondent "articulated legitimate reasons for its actions." (Appendix C at 10a.) The Court of Appeals found that the male selectee had more experience in Naval planning; the male selectee had worked on Master Planning teams for major naval installations; had

four (4) more years in Navy planning; good communication skills and had more and stronger supervisory experience and supervisory potential. (Appendix C at 11a.) The Court of Appeals found that with respect to a firm grounding in environmental sciences and real estate, petitioner and the male selectee were evenly balanced. (Appendix C at 11a.) The petitioner was firmly grounded in the environmental sciences, and the selectee had some experience in real estate.

The Court of Appeals held that the respondent had produced evidence leading to the conclusion that the decision to hire the male and not petitioner was not "motivated by discriminatory animus" and that petitioner failed to prove that the proffered reasons were pretextual. (Appendix C at 10a.)

In the petition for rehearing and suggestion for rehearing *en banc*, the petitioner pointed out item-by-item the evidence which the Court of Appeals, as well as the District Court, overlooked and ignored to reach their respective decisions. A review of this evidence here will supply the factual background against which the petitioner will urge this Court to review its decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to enunciate measures which federal trial courts must take to avoid the mechanistic and rigid application of *Burdine*, which results in the automatic entry of judgment for employers upon the mere *articulation* of neutral, non-discriminatory justification for their employment decisions.

1. Training and Experience.

The Court of Appeals found that the job description for the promotional position in question required training and experience in one of four professions, the most relevant of which was urban planning. The Court further found that

while Meyer had a Master's Degree in Urban Planning, Talley only had a Bachelor's Degree in Urban Studies with four semesters of city planning. (Appendix at C at 11a.)

The vacancy announcement was interdisciplinary and open not only to community planners, but architects and environmental engineers as well. Urban Planning was *not* the only relevant profession. Petitioner's 171 (application) indicates that she not only had a Master's Degree in Urban Planning that included 42 semester hours in that field, but that she also had 14 semester hours and 13 quarter hours in engineering, and 17 semester hours in architecture. The Court noted that Talley had four semesters in City Planning. According to Talley's 171, he had 8 semester hours in City & Regional Planning and 21 semester hours in Urban Studies. Accordingly, petitioner clearly surpassed Talley with respect to the academic training required for the promotional position.

2. "Firm Grounding" in Environmental Sciences and Real Estate.

Environmental Sciences were relevant to the duties and job elements of the vacancy announcement. Although Mr. Talley's working experience included some real estate research and real estate loans, the respondent's witnesses never discussed his real estate background as being a reason for selecting Talley. Overall, petitioner was clearly superior in four relevant disciplines.

3. Familiarity with the Navy and Its Institutions, Organizations, Terminology, and Modus Operandi.

The Court of Appeals found that Talley had almost four years more naval experience than Meyer. (Appendix C at 11a). However, the vacancy announcement was not limited to current or former Navy personnel. Rather, it was apparently assumed that the individual selected could learn what-

ever was essential to perform the job duties. Moreover, no claim was made at trial that petitioner did not possess this knowledge. Rather, it was merely noted that Talley had been with the Navy almost four years longer than petitioner. Captain O'Connell, a member of the selection panel, testified that "Talley had more relationships with a greater number of military installations than Meyer." (Appendix at :2-4) O'Connell mentioned this in response to a question as to what Talley did that Meyer did not do. O'Connell based his perception on the assumption that petitioner's relationship would have been limited to those installations in the coastal zone. By nature of the Navy's mission, the majority of installations could be expected to be located in the coastal zone. However, they were also located within urbanized areas where intergovernmental coordination would be more critical. Petitioner testified that she had to deal with inland work under OMB Circular A-95. In contrast, the respondent's witnesses emphasized the effort Talley put into Master Plans for only two installations, i.e. Point Loma and North Island.

4. Good Communication Skills.

The Court of Appeals found that the job description required good communication skills for successful performance of the position requirements. (Appendix C at 11a). The Court's conclusion relative to this finding is critical: "The district court's acceptance of the panel members' testimony that Talley excelled in communication based on a telephone interview is not clearly erroneous. Mr. Mildes testified that Meyer did not communicate well in a group discussion which he had observed." (*Id.*)

Selection panel members claimed that they selected Talley on the basis of his performance during an interview that lasted approximately ten minutes. During this interview,

Talley was alleged to have answered questions in-depth demonstrating he had greater knowledge of complex functions of the Inter-governmental Office and had done so in an allegedly outstanding verbal manner. The fact that this was a very brief *telephone* interview conducted via an airport phone renders the panel members' critical acclaim of Talley's communication skills truly incomprehensible, not to mention, pretextual.

Mildes' example of a situation in which he allegedly observed Meyer's poor communication skills was that she "didn't participate to the extent that she could have." Yet, petitioner explained that on that particular occasion she had a sore throat and found it necessary to request a microphone. Mildes failed to give any other examples in which he observed petitioner experience any difficulty speaking in a group. O'Connell stated that petitioner was very articulate, handled herself well, and that she spoke well before groups. He said petitioner's ability to speak on her feet before groups was good. In fact, O'Connell stated that she prepared and defended the Navy's positions rather well. Accordingly, O'Connell's testimony indicates that petitioner met and probably exceeded the vacancy announcement's requirement to communicate with large groups and defend a position. Moreover, the Navy continued to send petitioner to public meetings to speak on behalf of the Navy. Finally, O'Connell testified that Meyer's oral communication skills were satisfactory for a supervisory position and that she communicated with others effectively.

5. Supervisory Experience.

The Court of Appeals found that "the district court also found credible a panel member's testimony that Talley had more and stronger supervisory experience and more supervisory potential than (petitioner). Talley had extensive su-

pervisory work during his tenure in the Naval planning department, in part as a result of holding temporarily at an earlier time the position now in question. The district court's credibility findings regarding the supervisory skill qualifications are not clearly erroneous." (Appendix C at 10a and 11a.)

Prior to Talley's detail to the promotional position in July, 1979, the only Navy supervisory experience he noted in his 171 was the supervision of 1 PDC Trainee. Moreover, the respondent's trial witnesses exaggerated his responsibilities far beyond what Talley himself described and in fact contradicted each other. For example, Pearson said Talley headed a master planning team. Mildes, who headed the master planning branch when employed by the Navy, said he knew Talley never headed a master planning team. Mildes said Talley's supervisory work was managing master plan *contracts*. Mildes also stated that petitioner was a one-person unit under him during his tenure. The respondent's witnesses conveniently overlooked the management responsibilites involved in acting as a one-person unit in charge of intergovernmental coordination.

With reference to the qualification of supervisory experience within the Navy, absolutely no evidence was introduced to demonstrate that Talley had any such experience until detailed to the promotional position in question. In contrast, petitioner had demonstrated experience with the United States Virgin Island (USVI) Airport Authority in addition to her detail. O'Connell admitted that petitioner had many traits that demonstrated the ability to supervise this group including motivation of subordinates; arranging for their training; working effectively with subordinates; producing quality work within cost and time limits; communicating effectively; understanding management goals; that

she would not have difficulty working with men; and that she did what she was asked to do.

Mildes even testified that it was petitioner who molded and shaped the environmental and intergovernmental work that led to the initial establishment of the Intergovernmental Affairs Office. He stated that petitioner, not Talley was the expert in this subject matter. Pearson also admitted that Talley did not have extensive knowledge of the laws nor extensive experience with outside agencies.

After petitioner spent several years molding and shaping the intergovernmental unit, Talley was selected. According to the Court of Appeals, Talley was selected partially because he supervised the office for over five months prior to the final promotional selection. The Court itself pinpointed the most critical fact in this case: The manner in which Talley was preselected and "groomed" for the position over the individual who had actually molded and shaped the work, demonstrates that discriminatory animus motivated the Navy's employment decision.

Pearson placed Talley into the detail and intended to keep him in the detail until permanent hiring for that position was completed. When the allowable 120 days for a noncompetitive detail expired, petitioner was then given a 60-day detail that was also supposed to last until final selection. However, following Meyer's 60-day detail, Talley was redetailed without competitive bidding and without prior OPM approval. This was contrary to both the Federal Personnel Manual Rules and the Navy Rules, the purpose of which was to prevent an employee from getting an inside track on a position with known promotional potential. Yet, this is precisely what the respondent accomplished. Moreover, Pearson admitted at trial that he knew these rules and his intent that Talley's two details enabled him to acquire

invaluable and career-enhancing experience in supervising an interdisciplinary group of professionals. During his first detail, Pearson also gave Talley the opportunity to take a course in supervision; an opportunity which was not offerred to petitioner.

In its Memorandum Decision, the Court of Appeals wholly ignored Talley's pre-selection and the defendant's violation of the rules prohibiting this activity.

Trial testimony further indicated that the selecting official was not given an opportunity to make an affirmative action decision because the three males on the panel only sent him one name, Talley's. Mildes testified that the selecting official was known to rubber-stamp panel selections. There was also evidence that the unanimity among the panel members was partly based on pressure from Pearson. Mildes admitted that he heard Pearson say at a division-wide meeting that Pearson would be pleased if Talley were selected and that this possibly influenced his (Milde's) decision to select Talley. O'Connell also testified and admitted to the possibility that he may have been influenced by Pearson in selecting Talley. Finally, the allegedly "secret" ballot was not in fact "secret."

REASONS FOR GRANTING THE WRIT

A. This Case Represents a Significant Question of Federal Law Which Has Not Been, But Should Be Decided By This Court.

This Court should grant review in order to resolve a substantial, recurrent question not heretofore decided by this Court, viz, whether, under *Texas Department of Community Affairs v. Burdine*, the defendant's burden of production includes proof of business necessity.

In *Burdine*, this Court fine-tuned its earlier decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell* extends the *prima facie case* doctrine developed in the areas of jury discrimination and voting rights cases to actions involving employment discrimination. See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977), and *Neal v. Delaware*, 103 U.S. 370 (1881). *McDonnell* sets forth the prevailing standard for allocation of the burdens of proof in employment discrimination cases. The formula announced by the Court allows for three (3) separate and discrete steps in most cases: (1) the employee must establish a prima facie case of unlawful discrimination; (2) the employer must articulate a legitimate, non-discriminatory reason in order to rebut the prima facie case; and (3) the employee must then have an opportunity to prove that the employer's articulated reason was a pretext to conceal unlawful discrimination. (411 U.S., at 802-04).

McDonnell brought order out of chaos. It became a referent for litigants and the courts. Application of the prima facie case doctrine allows for the efficient organization of often diffuse, accusatory, and nebulous contentions. Beyond the creation of a framework or process for orderly dispute resolution *McDonnell* contributes very little to the attainment of the broad national objectives Title VII seeks to achieve. The primary objective of Title VII is to "prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

Burdine, resolved the conflict and confusion which had emerged among the circuits regarding the employer's burden of proof under the second step of the *McDonnell* standard. Some circuits required the employer to prove by a preponderance of the evidence the non-discriminatory rea-

sons for its action. *Williams v. DeKalb County*, 577 F.2d 253 (5th Cir. 1978); and *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974). Others merely imposed an obligation on the employer to produce some evidence of a neutral, non-discriminatory reason. *Lieberman v. Gant*, 630 F.2d 609 (2nd Cir. 1980). Another pre-Burdine variant of the *McDonnell* standard imposed a duty on the employer to show that its reason was based on sound business considerations; that is, business necessity. *Abrams v. Johnson*, 534 F.2d 1226 (6th Cir., 1976).

This Court, in *Burdine*, held that the Fifth Circuit misconstrued the *McDonnell* standard. (450 U.S., at 256) The Court held that a presumption of discrimination is created once the employee establishes a prima facie case. The burden then shifts to the employer to rebut the presumption by clearly setting forth a legitimate, non-discriminatory reason for its action. (450 U.S., at 254) The imposition of the preponderance standard was disapproved, and the Court held that it is "sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (450 U.S., at 254-55) The employer need not persuade the court that it was actually motivated by the proffered reason. After the employer articulates its reason, the plaintiff must be given the opportunity to prove the reason is a pretext to conceal unlawful discrimination. (450 U.S., at 256). The burden placed upon the defendant is mainly procedural and its substantive content ephemeral. To satisfy the defendant's burden or articulation,

> (T)he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. *The explanation provided must be legally sufficient to justify a judgment for the defendant.* (T)he defendant's explanation of its *legitimate* reasons must be clear and reasonably specific. Thus the

> defendant must "frame the issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. (450 U.S., at 255-58)

The quest for a manageable judicial mechanism for handling an entirely unexpected increase in litigation commenced under Title VII and the recently resuscitated Civil Rights Act of 1866 (42 United States Code, Section 1981), sacrifices the national objective to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The *Burdine* standard allows, perhaps even encourages, an employer to articulate a fictitious reason and then requires the employee to prove the reason is pretextual, as occurred in this case. The employer went way beyond the formal stated qualifications for the position, and added such elusive and vague male-oriented ones as "cool," "forthright," "energetic," . . . "employment stability." (Appendix A at 2a and 3a.) Since the employer need not prove it was motivated by the proffered reason, (450 U.S., at 254), the result is a trial in which the true reason for the employee's non-selection by the employer may never be put in issue and thereby undermining *Burdine's* issue framing objective. Thus, *Burdine* becomes a ready refugee for the unscrupulous employer and sends a dangerous signal which has the potential of undermining the industrial peace Title VII achieved. It makes it appear as though the eradication of unlawful discrimination in employment is no longer a vital and desirable national objective.

Burdine's requirement that the employer's reasons be clear and specific does not shore up the tremendous breach it creates with regard to our nation's commitment to equal employment opportunity. The employer does not have to prove his reasons by any measurable evidentiary standard.

The employer need merely articulate his reasons with reasonable precision to satisfy the second *Burdine* step. Only an employer who would be so unfortunate as to be represented by an inept attorney would fail to satisfy his burden. A defense which can be proffered with so little effort has the direct practical effect of neutralizing Title VII, for it permits the employer to prevail by artful "jawboning." On the other hand, the employee, the party with the least financial and human resources, has a heavy measurable evidentiary burden of production and persuasion throughout the trial. Such overloading of one side in our system of civil litigation is a sport on the waters of the law. This Court should review *Burdine* and enunciate measures which counter-balance the tilt away from the realization of the nation's objective of equal employment opportunities.

Burdine unduly restricts the latitude trial judges need in order to obtain just results in Title VII cases. Under *Burdine*, after the employer articulates what may be an entirely specious reason for his employment decision, the employee is then permitted an opportunity by proving by a preponderance of the evidence that the employer's reason is a pretext. In effect, the employee is merely given an opportunity to prove that the employer is lying. As this Court stated in *United States Postal Service Board v. Aikens*, ___ U.S. ___, 103 S.Ct. 1478, at 1482 (1983): "In short, the district court must decide which party's explanation of the employer's motivation it believes." It should be immediately apparent that any rule of law whose efficacy rests upon recurring judicial findings that the owners and managers of the nation's businesses, industries, and governmental agencies are liars, is not going to be enforced with alacrity by federal district judges. The rule is inherently unappealing. As exemplified by the comments of the trial judge in this case, ". . . (t)he charge of discrimination is a

serious charge to be made against a person or persons. And it's incumbent on the court to make sure that such a finding — or before such a finding is made, the evidence, indeed, warrants it." (Appendix A at 5a.)

In *Burdine*, this Court implicitly recognized the onerous burden Title VII plaintiffs were being forced to shoulder. One of the three (3) reasons the Court felt that limiting the defendant's evidentiary obligation to a burden of production will (not) unduly hinder the plaintiff" was the Title VII plaintiffs' use of "the liberal discovery rules" supplemented by his or her "access to the Equal Employment Opportunity Commission's investigatory files . . ." (450 U.S., at 258.) Use of the discovery rules and access to the EEOC file or the Agency file, in the case of a federal employee, has little value where the employer's articulated reason is based on subjective considerations, as occurred here. Promotion to high level professional type jobs usually rests on subjective considerations as opposed to objective facts or considerations. Usually, utilization of discovery devices such as interrogatories, requests for documents, and depositions, yields little, if any, admissible evidence and rarely a damaging admission. Even when oral examinations via pre-trial depositions are conducted of key witnesses, as was the case here, the same witnesses at the trial can amplify their testimony in unexpected details and even change their reasons. This is so because the reasons advanced are subjective the limits of which are boundless. Embellishments of pre-trial testimony at trial or the radical altering of such testimony only creates a problem of reconciling prior inconsistent statements. Thus, expensive and time consuming pre-trial discovery often contributes little to the search for truth in Title VII cases and the litigants merely circle back to square one with the trial judge deciding not only which side he or she believes but also deciding which version he or she believes.

In *Burdine*, this court declined to anchor the employer's burden of production to some measurable and identifiable interest as an employer, such as "sound business considerations." *Lieberman v. Gant*, *supra*, as well as *Abrams v. Johnson*, *supra*, are anchored to the employer's business interests. *Lieberman* recognized the University's First Amendment interest in academic freedom, and the decision not to award tenure to Dr. Lieberman was supported by detailed proof of her academic shortcomings. *Lieberman v. Gant*, *supra*, (23 FEP Cases 505, at 508-11).

The mischief wrought by *Burdine* can be corrected by this Court fine-tuning what the defendant's burden of production is in a Title VII case. Petitioner notes that the court did not reject or disapprove the Sixth Circuit's approach in *Abrams v. Johnson*, *supra*. In *Abrams*, the Sixth Circuit merely imposed an obligation upon the employer to show that its decision to select one applicant over another one "was a non-discriminatory decision *based on sound business reasons*." (*Abrams v. Johnson*, *supra*, (12 FEP Cases 1293, at 1297). This Court's decision in *Burdine* tracks Judge Friendly's finely-honed concept in *Lieberman v. Gant*. Here, the respondent's articulation was not anchored to the stated job qualifications, but incorporated concerns which were in no way demonstrated to relate to job performance. *Burdine* strays too far from *Griggs v. Duke Power Co.*, in which this Court stated:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. (401 U.S., at 431.)

A return to the requirement that the employer, as an aspect of his burden of production must prove that his decision is based upon "business necessity" will rein in the mischief wrought by *Burdine* and check the tilt away from the denial of equal employment opportunities.

B. The Absence Of A Business Necessity Requirement In The Employer's Burden Of Production Permits The Legal And Historical Stereotyping Of Women In The Workplace To Be Covertly Asserted As A Subjective Basis For An Employer's Decision.

Even a cursory review of the legal and historical stereotyping of the role of women in the workplace demonstrates that the court below did not closely scrutinize the reasons articulated by the respondent and, under *Burdine*, it had no reason to do so. Otherwise, it would have rendered judgment for petitioner.

In 1872, when Myra Bradwell attempted to become a member of the Illinois State Bar, this Court denied her claim reasoning:

> (T)he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the novel and benign offices of wife and mother. This is the law of the Creator. *Bradwell v. State of Illinois*, 83 U.S. 130, 141 (1872). (Bradley, J., concurring)

Justice Bradley explained that Ms. Bradwell's Fourteenth Amendment claim assumed that "the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life." *Id.* at 140. "It certainly cannot be affirmed, as an

historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law as well as nature itself has always recognized a wide difference in the respective spheres and destinies of man and woman." *Id.* at 141.

Even as late as 1977, the stereotypical notion as to a woman's role in the workplace still persisted. This Court determined that being male was a bona fide occupational qualification (b.f.o.q.) for the job of prison guard, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

In his dissent, Justice Marshall examined the stereotypical and romantically paternal stance taken by the majority in reaching its decision: "Once again, "[t]he pedestal upon which women have been placed has . . . upon closer inspection, been revealed as a cage." *Dothard*, *supra* at 345.

The Court later reiterated Justice Marshall's recognition of the dangers of masking romantic stereotypes by commonsense decisions:

> There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman. It is not true that the average woman driver is more accident prone than the average man. Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid. *Sail'r Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20 (1971).

It is now well-recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. "Myths and purely habitual assumptions about a woman's inability to perform

certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

Yet, stereotypical perspectives relating to the role of women in the workplace persist, albeit often invisibly. Such notions become even more operative in employment decisions by historically and predominantly male employers such as the respondent Navy. The macho game is the only game.

One factor contributing to this male-oriented environment is the fact that women are underrepresented as managers (25%) and professional workers (42%). Women's Bureau, Office of the Secretary, Bureau of Labor Statistics, United States Department of Labor (October 1980).

This lag in women managers in both the private and public sector workplace is directly related to a "pro-male evaluation bias" which is built into the work system. As a result, gender bias in the evaluation process skews the entire selection process for jobs open to women applicants. *See*, Nieva and Gutek, *Sex Effects on Evaluation*, 5 Academy of Management Review 267 (1980). Bias relating to the comparative qualifications and performance of male and female job applicants is just one factor involved in this gender bias phenomenon. For example, studies have demonstrated that male workers prefer to work with men rather than women and in particular, and indicate a clear preference for working with highly competent men over highly competent women. *Id.* at 268. The evaluation bias "has the maximally detrimental effects on women who are competent especially in promotions." *Id.* at 273.

This was precisely the situation that existed in this case. It was the unanimous opinion of every man who testified at

the trial that petitioner was extremely competent. Mr. Pearson, petitioner's immediate supervisor, characterized plaintiff as "tough as a bulldog" and "smart as a whip." Studies focusing on the evaluation of qualifications in promotional selections demonstrate fairly consistent bias in favor of men. *Id.* at 273. Various factors appear to affect the operation of gender-related evaluation bias. These factors include "sex-role incongruency" e.g., stereotypically-defining certain jobs as inappropriate to one's sex, sex-appropriate behaviors and less favorable evaluations for women who are highly qualified or perform well. *Id.* at 273.

The instant case presents a microcosmic example of the operation of many of these gender-bias principles. For example, in the instant case, petitioner was one of six (6) applicants for the promotional position selected by the Promotion Ranking Panel for oral interviews before the Advisory Selection Panel. Both panels were entirely composed of men.

The promotional position clearly involved supervisory responsibilities. When qualities such as leadership and responsibility are being assessed, the decision-making process must become somewhat subjective, regardless of the objective procedure set up. *Royal v. Missouri Highway and Transportation Commission*, 655 F.2d 159, 163-64 (8th Cir. 1981). Although not illegal *per se*, subjective promotion procedures are to be closely scrutinized because of their suceptibility to discriminatory abuse. *Id.* at 164; *accord*, *Rogers v. Int'l Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975). *See also*, *Williams v. Colorado Springs, Colo. Sch. Dist.*, 641 F.2d 835, 842 (10 th Cir. 1981); *Barnett v. W.T. Grant*, 518 F.2d 543, 550 (4th Cir. 1975).

Courts have frequently noted that subjective evaluation processes intended to recognize merit provide ready mecha-

nisms for discrimination. *See, e. g., Johnson v. Uncle Bens, Inc.*, 628 F.2d 419, 426 (5th Cir. 1980), *vacated*, 451 U.S. 902 (1981), *on remand*, 657 F.2d 750 (5th Cir. 1981); *Robbins v. White-Wilson Medical Clinic, Inc.*, 642 F.2d 153, 156 (5th Cir. 1981); *Royal, supra* at 164; *Senter v. General Motors Corp.*, 532 F.2d 511, 528-29 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *Shack v. Southworth*, 521 F.2d 51, 55-56 (6th Cir. 1975); *Harris v. Group Health Ass'n.*, 662 F.2d 869, 873 (D.C. Cir. 1981). Moreover, the legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves are not members of the protected minority. *See e.g., Royal, supra* at 164.

In *Burdine*, this Court recognized this danger by requiring the employer's articulated reasons to be "clear and specific" to guarantee the plaintiff "a full and fair opportunity" to demonstrate pretext. *Burdine, supra* at 253-56. However, the "clear and specific" limitation is not anchored to the resolution of the question of whether or not the employer acted out of a motive to promote his business or from one which is impermissible under Title VII. "Obviously the more subjective the qualification and the manner in which it is measured, the more difficult it will be for the defendant to meet the burden imposed by the court in Burdine." *Robbins, supra* at 156.

The mere fact that the subjective process is intended to recognize merit does not necessarily alleviate its susceptibility to discriminatory abuse. *Royal, supra* at 164.

> When the evaluation is in any degree subjective and when the evaluators themselves are not members of the protected minority, the legitimacy and nondiscriminatory basis of the articulated reason for the decision should be subject to particularly close scrutiny

by the trial judge. *Id.* at 164; *Page v. Balges*, 645 F.2d 227, 230 (4th Cir. 1981).

The ultimate issue in each case is whether the subjective criteria were used to disguise discriminatory action. *Ramirez v. Hofheinz*, 619 F.2d 442, 446 (5th Cir. 1980).

In the instant case, petitioner, as an applicant for the promotional position, was required to complete a partially-objective and partially-subjective application process. A certain degree of subjectivity was undeniably inherent in the ranking process as well as the oral interviews. Yet, both of these segments of the selection process were controlled exclusively by men. This is precisely the type of inherently disciminatory decision-making which called for close scrutiny by the courts below.

Moreover, defendant maintained a clearly male-oriented and in fact male-dominated work environment. The male-dominated world of the military overlaps into its civilian workplace. By respondent's own admission, petitioner's supervisor Mr. Pearson had a "command-style" of supervision.

Petitioner's non-promotion presents the precise result Title VII aims to prevent. The command's employment decision with respect to petitioner was based on the traditional stereotype of a woman with all the answers, knowlegeable and in fact, depended upon by men to have a firm grasp on a particular job area; that is, a woman's place as a subordinate. Yet, when it comes to being in a position of authority *over* men, with responsibility, to direct their work, gender again prevents an otherwise reasonable and non-discriminatory promotion decision.

The notion that some jobs are for men and some for women is particularly rampant in a predominately and

male-oriented environment like the Department of the Navy. Accordingly, the male selection panel members may well have become so acculturated to these stereotypical premises, they may have acted without even being aware of an intent to discriminate.

Finally, it is simply not realistic in today's world to expect an employer to admit an intent to discriminate nor to deny such a motive, and mean it.

The struggle of women to advance in the workplace is not only limited by the persistence of stereotyping and predominantly male-made employment decision, but also by the courts reluctance to assist in the implementation of Title VII as a legal remedy.

This problem involves the legal standard applied in gender discrimination cases. Race discrimination claims are judged by the "strict scrutiny" standard. Under this standard, race and national origin are considered "suspect." Such classifications must accomplish a compelling state interest to withstand constitutional review and are virtually never upheld. *See generally, Loving v. Virginia*, 388 U.S. 1 (1967) *Hernandez v. Texas*, 347 U.S. 475 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). This is the highest and most demanding standard applied in discrimination cases as the court undertakes very close scrutiny of the alleged Title VII violation.

In gender cases, however, the allegedly unlawful employment decision is not judged by an equally demanding standard. Rather, gender is considered a "quasi-suspect" classification and courts apply the "rational basis" test, questioning whether the employer's gender classification serves important governmental objectives and is substantially related to the achievement of those objectives. *See gener-*

ally, Craig v. Boren, 429 U.S. 190, 197 (1976); *Reed v. Reed*, 404 U. S. 71, 75 (1971).

The overall effect of the different legal standard is that the employer's burden in articulating a rationale for its decisions is not as great in a gender case and, accordingly, the court does not judge its action as "harshly" as it would in a race case.

The combination of persistent stereotyping and less strict legal analysis places gender discrimination cases, such as this one, in a peculiarly problematic light. Imposition of an obligation on the employer to prove business necessity would allow trial judges to scrutinize the reasons advanced by the employer for their substantive content. Those which bare no discernible relationship to the job to be performed but rather reflect a covert preference for males would be flushed out. Gender bias would not be permitted to mask itself as facile articulations such as "energetic," "cool," or familiar with a "broader range of issues." Women, in particular, would no longer be hindered by procedural rules in proving that they can, have done, and can do "a man's work" in high placed and high paying positions.

CONCLUSION

For the reasons stated, petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

HOWARD MOORE, JR.
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Oakland, California 94610
Attorney for Petitioner

October 24, 1984

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-4913-WWS

CAROL L. MEYER,

Plaintiff,

v.

JOHN LEHMAN, SECRETARY OF THE NAVY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court: I will read to you my findings of fact and conclusions of law in this matter at this time.

The complaint in this matter arises out of the failure of plaintiff to be appointed to the position of Supervisor of the Intergovernmental Coordination Unit in the Planning Division of the Naval Facilities Engineering Command in San Bruno, California.

The person who was appointed to that position from among a group of applicants, Robert Talley, was a man; and the plaintiff charges that sex discrimination was a factor in the selection.

Now, to begin with, it is not disputed by the defendant that the plaintiff was qualified for the position. As a member of the protected class, she made out a *prima facie case.*

The defendant has come forward with evidence of what it holds out to be non-discriminatory reasons for the final selection; that selection of Talley was made by means of a process which is prescribed by the Navy regulations.

Following the advertising of the new position, a ranking panel was convened, and early in March of 1980 that panel selected from among all of the applicants the six people whom it ranked as being the highly qualified applicants. This group of six included both the plaintiff and Talley.

Within a day or so—probably on the fourth of March—an advisory selection panel was convened and met to interview those six applicants. The interviews were held that day on short notice in the belief that a hiring freeze was imminent.

The panel interviewed the plaintiff and also Mr. Talley, the latter by telephone because he was out of the city on that day.

At the end of the interviews the three panel members unanimously agreed to recommend Mr. Talley, who was then appointed by the commanding officer to the position. The commanding officer himself made no independent judgment, but essentially accepted the recommendation of the panel since it appeared to be in order.

The three members of the panel were Brian O'Connell, who was the head of the planning real estate department; Martin Pearson, who was the chief of the planning division; and James Mildes, who was the supervisor of the master planning branch under Mr. Pearson.

Each of the three members of the panel testified as to the reasons for their decision to recommend Talley. First, Captain O'Connell testified that he chose Talley because he considered him best qualified based on his demonstrated grasp of planning, his communication skills and his ability to supervise others. He considered that Talley's planning activities had exposed him to a broad range of issues. He had confidence in his ability to represent the Navy's interest. He considered him to be cool, forthright, energetic, and he considered that he could write well.

These views were based on some personal contacts with him over time in the office and some direct exposure to his work.

Based on these factors, he rated Talley ahead of all other candidates.

Now Mr. Pearson in his testimony stated that he selected Talley on the basis of what he considered an exemplary interview. However, it is quite clear that at the time he also had in mind Talley's planning experience, his performance on the job and his employment stability.

Plaintiff's own arguments here are to the effect that Mr. Pearson had a preference for Mr. Talley based on their association and on what Mr. Pearson considered to be Talley's performance. There isn't any reason I can see to infer from it predisposition toward Talley on Pearson's part. That standing alone does not seem to me to merit a inference of a discriminatory motive for that preference.

The third member, Mr. Mildes, testified he selected Mr. Talley because of his extensive experience in managing master plan projects, his demonstrated ability to communicate with people in difficult situations, and his extensive background in Navy planning.

Now the plaintiff has, indeed, established her strong qualifications in environmental planning, and in particular, in the matter of dealing with problems arising under certain local regulations. And these qualifications are relevant and were relevant to the position which is in question here.

But the issue, as the court sees it, is not whether plaintiff might have been a good and perhaps even a better choice. That decision is not one for the court to make.

The question is whether the plaintiff has shown by a preponderance of the evidence that the reasons given by the defendant's witnesses were not the true reasons and that sex discrimination was a factor in the selection of Talley.

In the court's view, the evidence does not sustain such a finding. There was substantial credible evidence on the basis of which a fairminded person could have selected Talley over the

plaintiff. Among other things, his ability to communicate and to supervise the performance of work of others could reasonably be found to be superior.

In addition, there was some evidence of certain shortcomings on the part of the plaintiff. Without going into those in any length, they included lack of supervisorial experience and a failure in certain instances to respond promptly to certain demands.

Now, plaintiff has sought to show that there was some irregularities surrounding the promotion process. The thrust of those arguments is that, in effect, it had been predetermined to promote Talley and that the plaintiff didn't get a fair shot at the position.

Now, it's true that Talley's interview was by telephone, apparently because of the time pressure created by the belief that a hiring freeze was imminent. Talley was out of town, and acting on that belief, the panel felt that it had to complete interviews on the fourth of March.

One could speculate that a telephone interview does not afford a very powerful basis for promotion decision; but the objective facts concerning Mr. Talley's qualifications, and other evidence supporting the decision, which stands essentially unimpaired, suffice in the court's mind to dispel any adverse inference from the fact that the decision here was based on the telephone interview.

Plaintiff also argues that Mr. Pearson had predetermined to select Talley. There is evidence to suggest that Mr. Pearson did consider Talley as a leading candidate and that, indeed, he may have had some influence on the other members of the panel, one of who was subordinate to his superior in making the selection.

It appears to the court that it would be wholly unrealistic to expect the manager of the division whose familiar with the prior performance of the candidates to enter into these deliberations of the selection panel with a wholly blank slate in his

mind and without any kind of preference. The existence and expression of such a preference do not appear to be in themselves evidence of a sex-based animus without more.

And here the evidence which I have already discussed provides ample non-discriminatory reasons for a decision to prefer Mr. Talley.

As far as the detailing is concerned, and other aspects of the procedure, the court can find no irregularities which are relevant to the decision of this case.

Now, to sum it up, in this case the plaintiff has the burden of proving intentional discrimination by a preponderence of the evidence. There is, indeed, a very strong public policy in favor of eliminating discrimination. And the court is very conscious of the way that discrimination is frequently perpetuated in insidious ways.

But at the same time, the charge of discrimination is a serious charge to be made against a person or persons. And it's incumbent on the court to make sure that such a finding—or before such a finding is made, the evidence, indeed, warrants it.

The fact that there may have been a possibility under these circumstances of the persons who made the selection were conscious or unconsciously motivated by some kind of gender-based preference is not enough.

In this case the defendant has come forward with reasons which have not been, in the court's mind, convincingly refuted. Reasonable persons might well have reached different decisions on the promotion. But the evidence is insufficient to establish that more probably than not sex discrimination was the factor in the decision to recommend Talley.

For these reasons the court concludes that judgment shall be entered in favor of the defendant; parties to bear their own costs.

Mrs. Reiley, would you submit a form of judgment. And, Mr. Moore, if you wish to have these findings in more formal form, you can have them written up and I'll sign them.

Mr. Moore: Thank you, Your Honor.

Mrs. Reiley: Thank you, Your Honor.

The Court: Thank you.

(Whereupon, the trial concluded.)

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-4913-WWS

CAROL L. MEYER,

Plaintiff,

v.

JOHN LEHMAN, SECRETARY OF THE NAVY,

Defendant.

FILED
May 9, 1983
WILLIAM L. WHITTAKER
Clerk, U.S. District Court
Northern District of California

JUDGMENT

Judgment in this action is hereby entered in favor of the defendant, John Lehman, Secretary of the Navy. The parties are to bear their own costs.

UNITED STATES DISTRICT JUDGE

DATED: 5/9/83

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-2074
D.C. No. C-82-4913-WWS

CAROL L. MEYER,

Plaintiff-Appellant,

VS.

JOHN LEHMAN, SECRETARY OF THE NAVY,

Defendant-Appellee.

FILED
April 3, 1984
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

MEMORANDUM*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
The Honorable William W. Schwarzer, District Judge, Presiding
Argued and submitted February 16, 1984

Before: ANDERSON, SCHROEDER, and ALARCON, Circuit Judges.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit.

Appellant Carol Meyer (Meyer) brought a civil rights suit against her employer, the U.S. Navy, alleging she was denied a promotion because of her sex. The district court found in favor of the Navy. We affirm.

I. Background

In 1979, the Navy established an intergovernmental coordination unit to which both Meyer and Robert Talley (Talley) were assigned. In 1980, Meyer applied for the unit's newly authorized position of permanent supervisor. The selection panel, comprised of three men, unanimously selected Talley for the job. Meyer filed an Equal Employment Opportunity complaint. The EEO complaint examiner could find no evidence of discrimination. The Secretary of the Navy adopted the examiner's conclusion and the EEOC denied Meyer's subsequent appeal. Meyer then filed a Title VII Civil Rights Act complaint in the district court. After a non-jury trial, the district court found the evidence insufficient to establish gender discrimination against Meyer.

II. Burden of Proof and Standard of Review

The plaintiff in a Title VII action bears the initial burden of establishing a prima facie case of employment discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Once a prima facie case is established, the burden shifts to the defendant to articulate legitimate reasons for its actions and to produce evidence "which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Finally, a plaintiff is given an opportunity to demonstrate that the preferred reasons are pretextual. *McDonnell Douglas*, at 804.

The court in *Burdine* held that a defendant in a Title VII action is not required to prove that the person hired was more qualified than the plaintiff. The court stated:

> The court of appeals has misconstrued the nature of the burden that *McDonnell Douglas* and its progeny place on

> the defendant. . . . We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produces evidence of legitimate nondiscriminatory reasons.'" (citation omitted)
>
> ———
>
> We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action: that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.

450 U.S. at 256, 257.

After the plaintiff has established a prima facie case of discrimination, the trial court should proceed directly to the ultimate issue of whether the defendant intentionally discriminated against the plaintiff on the basis of sex. *Wall v. National Railroad Passenger Corporation*, 718 F.2d 906 (1983). The plaintiff retains the burden of persuasion. *United States Postal Service Board of Governors v. Aikens*, ____ U.S. ____, 75 L.Ed. 2d 403, 103 S.Ct. 1478 (1983). The district court's findings will be upheld unless clearly erroneous. Fed. R. Civ. P. 52(a).

III. Discussion

We believe there was sufficient credible evidence for the district court to find that the Navy "articulated legitimate reasons for its actions" and produced evidence leading to the conclusion that the decision to hire Talley and not Meyer was not "motivated by discriminatory animus" and that Meyer failed to prove that the proferred reasons were pretextual.

The district court correctly found that both candidates were well qualified for the position. The district court accepted the selection panel members' testimony that Talley surpassed Meyer in certain areas of qualification they considered very important. First, the job description required training and

experience in one of four professions, the relevant one being urban planning. Meyer had a master's degree in urban planning. Talley only had a bachelor's degree in urban studies with four semesters of city planning. Talley, however, was considered by Captian O'Connell and Mr. James Mildes, of the selection panel, to be more experienced in naval planning, which the Navy considers a unique speciality. He had worked on master planning teams for major naval installations and had been in the naval planning department for close to four years before Meyer joined the Navy.

Second, the job description states that a "firm grounding" in environmental sciences and real estate is desirable. Here, the two candidates balanced each other out. Meyer had an edge in the area of environmental sciences, while Talley had experience in real estate practices, which Meyer did not.

Third, the job description listed "familiarity with the Navy and its institutions, organizations, terminology and *modus operandi*" as essential. As stated above, Talley had almost four years more naval experience than Meyer. Captain O'Connell felt that Talley had more relationships with a greater number of military installations than Meyer.

Fourth, the job description stated that successful performance in the position required good communication skills. The district court's acceptance of the panel members' testimony that Talley excelled in communication based on a telephone interview is not clearly erroneous. Mr. Mildes testified that Meyer did not communicate well in a group discussion which he had observed.

The district court also found credible a panel member's testimony that Talley had more and stronger supervisory experience and more supervisory potential than Meyer. Talley had extensive supervisory work during his tenure in the Naval planning department, in part as a result of holding temporarily at an earlier time the position now in question. The district

court's credibility findings regarding the supervisory skill qualification are not clearly erroneous.

IV. Conclusion

The district court listened to all of the testimony and reviewed all of the evidence presented to it by the parties and came to the conclusion that the defendant satisfied its burden of articulating legitimate, non-discriminatory reasons for its actions and that the plaintiff had failed to provide that these reasons were pretextual. Based upon our review of the record, it cannot be said that the district court was clearly erroneous in its conclusions. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-2074
D.C. No. C-82-4913-WWS

CAROL L. MEYER,

Plaintiff-Appellant,

v.

JOHN LEHMAN, SECRETARY OF THE NAVY,

Defendant-Appellee.

FILED
June 26, 1984
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

ORDER

Before: ANDERSON, SCHROEDER, and ALARCON

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-656

In the Supreme Court of the United States

OCTOBER TERM, 1984

CAROL L. MEYER, PETITIONER

v.

JOHN LEHMAN, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-656

CAROL L. MEYER, PETITIONER

v.

JOHN LEHMAN, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner seeks review of a court of appeals' decision affirming a district court judgment that she failed to establish her claim of gender discrimination in this Title VII case.

1. Petitioner is a GS-12 civilian employee at the Naval Facilities Engineering Command in San Bruno, California (Pet. 3; Pet. App. 1a). In 1979, the Navy established an intergovernmental coordination unit to which both petitioner and Robert Talley were assigned (Pet. App. 9a). Both applied for the unit's newly-created GS-13 permanent supervisor position (*ibid.*; Pet. 3). A selection panel consisting of three men unanimously chose Talley for the job (*ibid.*). Petitioner thereafter filed an Equal Employment Opportunity complaint and unsuccessfully exhausted her administrative remedies (*ibid.*). She then brought this action in the district court, alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).

After a nonjury trial, the district court held against petitioner (Pet. App. 1a-6a), finding the evidence insufficient to establish discrimination based on sex (*id.* at 5a). The court recognized that both candidates were well qualified for the position (*id.* at 2a), but observed that "[t]here was substantial credible evidence on the basis of which a fairminded person could have selected Talley over the [petitioner]," stressing Talley's "ability to communicate and to supervise the performance of work of others." *Id.* at 3a-4a. The court also noted Talley's superior experience in Navy planning activities (*id.* at 2a-3a). Thus, while "[r]easonable persons might well have reached different decisions on the promotion," the court found that "the evidence is insufficient to establish that more probably than not sex discrimination was the factor in the decision to recommend Talley." *Id.* at 5a.

Petitioner appealed, and the Ninth Circuit affirmed. The court of appeals held that the district court's factual findings were not clearly erroneous, emphasizing Talley's communication skills and superior supervisory experience and potential, as well as the fact that Talley had four more years of experience in the Navy Department than did petitioner. Pet. App. 10a-11a. The court therefore held that the district court's conclusion that plaintiff had failed to carry her burden of proving discrimination was not clearly erroneous.

2. Petitioner urges this Court to modify its unanimous holding in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), to require the defendant in a Title VII case alleging discriminatory treatment to produce evidence of "business necessity" for an employment decision, once the plaintiff has established a prima facie case of discrimination. In *Burdine*, however, this Court considered and rejected such an approach in a case of discriminatory treatment by an individual claimant (450 U.S. at 258-259); the Court stated that Title VII "does not demand that an

employer give preferential treatment to minorities or women," nor is it "intended to 'diminish traditional management prerogatives.' " 450 U.S. at 259. Requiring an employer to produce evidence of "business necessity" for its individual employment decisions, however, would have precisely these effects, instead of merely assuring "neutral employment and personnel decisions." *Ibid.*

Burdine held that once the plaintiff in a discriminatory treatment case has established a prima facie case, the defendant must produce evidence of a legitimate, nondiscriminatory basis for the challenged employment decision, but that the plaintiff then bears the ultimate burden of proving that the proffered nondiscriminatory reasons are pretextual. The *Burdine* approach is entirely consistent both with the goals of Title VII and with the traditional principle that the plaintiff bears the burden of proving his or her case. Title VII simply does not contemplate the type of burden shifting advocated by petitioner. Thus, there is no basis for petitioner's proposed modification of *Burdine*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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